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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

CESAR GONZALEZ,

Defendant and Appellant.

E047785

(Super.Ct.No. INF057785)

OPINION

APPEAL from the Superior Court of Riverside County. David B. Downing,
Judge. Affirmed.

Rudy Kraft, under appointment by the Court of Appeal, for Defendant and
Appellant.

No appearance for Plaintiff and Respondent.

Defendant and appellant Cesar Gonzalez appeals from a guilty plea to first degree burglary (Pen. Code, § 459)¹ with personal use of a handgun (§ 12022.5, subd. (a)) and willfully discharging a firearm in a grossly negligent manner (§ 246.3). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

At the preliminary hearing, a police officer testified he went to an apartment complex at 1:40 a.m., on March 11, 2007, in response to a report of “shots fired.” When the officer arrived, he made contact with a witness who was standing outside the apartment. The witness told the officer she was having a party at her apartment; she was standing outside the apartment when she saw defendant, who appeared agitated. When asked if she knew defendant, she said he was “a friend of the father of her child.” The witness told defendant to leave and they argued. Defendant pushed the witness out of the way, and he appeared to be removing a handgun from his waistband on the right side. Defendant then went inside the apartment. The witness heard four loud sounds coming from inside the apartment, which appeared to be gunshots.

Another witness who was present inside the apartment said she saw defendant remove a handgun from the right side of his waistband and begin firing shots. She hid in the bedroom with six other people. When the shots appeared to have stopped, she opened the door but saw defendant walking toward her, so she shut the door again. The door was then kicked open, and defendant was on the other side of the door. Defendant pointed the gun at the people in the bedroom and then walked away.

¹ All further statutory references are to the Penal Code.

The officer also testified there were marks and cracks on the bedroom door that were consistent with being kicked. Shell casings, slugs, and bullet fragments were found inside the apartment. Two witnesses were able to identify defendant in a photographic lineup as the person who went inside the apartment with a gun.

Defendant was charged by information with first degree burglary (§ 459) and personal use of a handgun (§ 12022.5, subd. (a)) (count 1); willfully and maliciously discharging a firearm at an inhabited dwelling (§ 246) (count 2); and willfully discharging a firearm in a grossly negligent manner (§ 246.3) (count 3). It was further alleged defendant committed these offenses while released from custody prior to the judgment becoming final in another case. (§ 12022.1.)

On November 18, 2008, defendant filed a motion to set aside count 2. The trial court granted the motion on November 21, 2008.

On November 24, 2008, defendant pled guilty to counts 1 and 3 in response to an “indicated sentence” by the court of five years in prison.² Prior to accepting his guilty plea, the court advised defendant the maximum sentence on the allegations against him was 18 years eight months. On the record and on a written plea form, defendant admitted a factual basis for his guilty plea. The court then sentenced defendant to the low term of two years on count 1, plus a consecutive term of three years for the personal use of a

² “In an indicated sentence, a defendant admits all charges, including any special allegations and the trial court informs the defendant what sentence will be imposed. No ‘bargaining’ is involved because no charges are reduced. [Citations.]” (*People v. Allan* (1996) 49 Cal.App.4th 1507, 1516.)

handgun. On count 3, the court sentenced defendant to a concurrent term of two years. For sentencing purposes, the court struck the allegation that defendant committed the charged offenses while on bail in another case. On December 31, 2008, defendant surrendered to commence his prison sentence.

DISCUSSION

On February 23, 2009, defendant filed a notice of appeal and a request for a certificate of probable cause claiming he received ineffective assistance of counsel. The trial court granted defendant's request on February 23, 2009. We appointed counsel to represent defendant on appeal. However, the notice of appeal was not timely as to the initial sentencing. On November 6, 2009, counsel filed a motion to treat the late notice of appeal as timely filed. The motion was granted on November 20, 2009.

Appointed counsel on appeal has filed a brief under *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738, setting forth the facts and procedural history, raising no specific issues, and requesting this court to conduct an independent review of the record. On January 11, 2010, we offered defendant an opportunity to file a personal supplemental brief.

On March 8, 2010, defendant submitted a supplemental brief claiming he received ineffective assistance of counsel prior to the entry of his guilty plea. Defendant believes counsel was ineffective because he or she (1) guaranteed an acquittal if defendant went to

trial;³ (2) pressured him to plead guilty when he wanted to go to trial; (3) declined to file a motion to withdraw the plea; and (4) failed to adequately investigate the case and follow up on alibis.

A cognizable claim of ineffective assistance of counsel following a guilty plea requires a showing that the defendant would not have pled guilty and insisted on going to trial but for counsel's incompetent advice. (*In re Resendiz* (2001) 25 Cal.4th 230, 253.) Such a claim must be corroborated by independent, objective evidence. (*Ibid.*) Pertinent factors to be considered include the advice actually given by counsel, whether counsel accurately and effectively communicated the terms of the offer to the defendant, and the difference between the offer and the probable consequences of proceeding to trial, as viewed at the time the offer was made. (*Ibid.*)

Without more, the record suggests counsel's advice to enter a guilty plea was competent under the circumstances.⁴ Testimony presented at defendant's preliminary hearing indicates two witnesses identified him as the person who went into the victim's apartment and indiscriminately fired a gun several times. The trial court advised defendant he could be sentenced to a maximum of 18 years in prison if convicted at trial. Defendant was offered an indicated sentence of five years in exchange for a guilty plea.

³ We note that this allegation conflicts with the written retainer agreement defendant attached as exhibit A to his supplemental brief. On page 2, the agreement states as follows: "Criminal cases, by their very nature, are unpredictable. No guarantee is made as to the outcome of the case. . . ."

⁴ Ineffective assistance of counsel claims based on matters outside the record on direct appeal are more appropriately raised in a habeas corpus proceeding. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

There is nothing in the record to suggest defendant would have had any viable reason for rejecting the exceedingly favorable offer he accepted in order to proceed to a jury trial.

We must therefore reject defendant's ineffective assistance of counsel claim.

We have concluded our independent review of the record and find no arguable issues.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

KING
J.